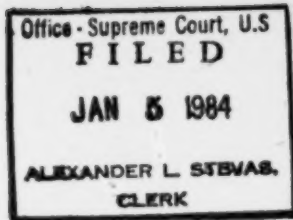


83 - 1116



No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

LUCY M. HUNT AND GUESS WHAT, INC.,
Petitioners,

vs.

STATE OF TENNESSEE,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS
OF TENNESSEE**

STEPHEN D. WAKEFIELD
MICHAEL F. PLEASANTS
2000 First Tennessee Building
Memphis, Tennessee 38103
(901) 526-2000
Attorney for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. Is a fine of \$15,000.00 on each charge or a total of \$45,000.00 for three (3) obscenity misdemeanor violations an excessive fine prohibited by the Eighth Amendment of the United States Constitution?

2. Is Tennessee Code Annotated, Section 39-6-1104(f) providing for a minimum fine to a corporation of \$10,000.00 and a maximum fine of \$50,000.00 for each violation of a misdemeanor charge of obscenity excessive punishment prohibited by the Eighth Amendment?

3. Is Tennessee Code Annotated, Section 39-6-1104(e) providing for two classes of punishment for violators of the obscenity statute in violation of Equal Protection and Due Process?

4. Is Tennessee Code Annotated, Section 39-6-1117 exempting persons from the Tennessee obscenity law overbroad and arbitrary?

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OPINIONS BELOW

The opinion of the Tennessee Court of Appeals, not yet reported, is printed as Appendix A. The denial of the Petition to Rehear is Appendix B and the denial of the Supplement to the Petition to Rehear is Appendix C. The denial of the Application for Permission to Appeal by the Tennessee Supreme Court is not yet reported but is printed as Appendix D.

JURISDICTION

The Supreme Court of Tennessee denied Application for Permission to Appeal of Petitioners on November 7, 1983. The Petition for Writ of Certiorari is filed within sixty (60) days of that date. Jurisdiction is invoked under 28 U.S.C. §1257(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 8

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment 14, Sec. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

T.C.A. 39-6-1104. (a) It shall be unlawful to knowingly send or cause to be sent, or bring or cause to be brought, into this state for sale, distribution, exhibition, or display, or in this state to prepare for distribution, publish, print, exhibit, distribute, or offer to distribute, or to possess with intent to distribute or to exhibit or offer to distribute any obscene matter. It shall be unlawful to direct, present, or produce any obscene theatrical production, peep shows or live performance and every person who participates in that part of such production which renders said production or performance obscene is guilty of said offense.

• • •

(d)(1) Any person who violates the provisions of this section shall, upon conviction of the first such offense, be guilty of a misdemeanor and be punished by imprisonment in the county jail or workhouse for a period of sixty (60) days.

(e)(1) For purposes of this subsection, a Class A violator shall be any person sentenced under the provisions of subsection (d) who distributes obscene books, magazines, newspapers, pictures, drawings, photographs or other printed or written material when such obscene material represents twenty-five percent (25%) or less of the stock-in-trade, and inventory, and sales of such violator during any given twenty-four (24) hour period. A Class B violator shall be any other person sentenced under the provisions of subsection (d) who is not defined as a Class A violator. Upon application for sentencing as a Class A violator, as defined above, such violator shall have the burden of proving his classification.

(2) The sentences imposed in subsection (d) of this section shall be mandatory for a Class B Violator, and no Class B violator sentenced under the provisions of such subsection shall be eligible for suspension of sentence and probation, release on parole, or any other program whereby such person enjoys the privilege of supervised or unsupervised release into the community or whereby such person is released, permanently or temporarily, prior to the expiration of his sentence, including, but not limited to, participation in any programs authorized by §§ 41-21-208 or 41-21-227. Provided, further, no Class B violator sentenced under subsection (d) of this section shall receive good, honor or incentive time credit towards the expiration of such sentence as authorized by §§ 41-21-212, 41-21-214 or 41-21-228; nor shall such sentence expire in any other manner until it has been entirely served day for day.

• • •

(f) Any corporation or entity doing business in the state of Tennessee which violates the provisions of this section shall, upon conviction, be fined an amount of not less than ten thousand dollars (\$10,000) nor more than fifty thousand dollars (\$50,000).

T.C.A. 39-6-1117. There shall be exempt from the provisions of this chapter:

- (1) Any public library which is entirely or partially supported by public funds;
- (2) Any recognized and established educational institutions and the libraries therein;
- (3) Any recognized and established museum;
- (4) Any recognized and established historical society;
- (5) Any licensed practitioner of the healing arts, medical clinic or hospital while engaged in a professional capacity;
- (6) Any governmental agency;
- (7) Any governmental sponsored organization;
- (8) Any other nonprofit association or entity which is engaged in the collection and preservation of historic or religious documents; and
- (9) Any person, employee or agent acting in an official capacity for such organization.

STATEMENT OF THE CASE

The Petitioners challenge amendments adopted in 1980 (Tennessee Public Acts 1980 (Adj. S) Ch. 174) to the Tennessee obscenity statute. These amendments inserted an exemption for certain persons or entities to the obscenity statute codified as T.C.A. §39-6-1117 and revised the punishment provisions which are codified as T.C.A. 39-6-1104. Pertinent portions are quoted above.

The punishment for obscenity violations was amended to provide that any person convicted of a first offense was guilty of a misdemeanor and would be punished by imprisonment for a

period of sixty (60) days. The legislature established Class A and Class B violators. No Class B violator would be eligible for suspension of sentence and probation, release on parole, or any other program including work release and would not receive good, honor or incentive time credit for the expiration of the sentence but the sentence would be entirely served day-for-day. Petitioner Lucy M. Hunt submits that the classification of Class A and Class B violators has no rational basis, is arbitrary, vague and indefinite in violation of Equal Protection and Due Process.

The 1980 amendments also provided that any corporation or entity would be fined not less than \$10,000.00 nor more than \$50,000.00 for this misdemeanor.

The Tennessee legislature followed the rulings of this Court in *Miller v. California*, 413 U.S. 15 and adopted a comprehensive obscenity statute which was upheld as constitutional by the Tennessee Supreme Court in *Taylor v. State*, 544 S.W.2d 897 (1976). An attempt was made to substantially change the obscenity law by the passage of the Tennessee Obscenity Law of 1978 which was held unconstitutional in *Leech v. American Bookstores, Ass'n*, 582 S.W.2d 738 (1979). The *Leech* decision revived the prior constitutional statute.

The Tennessee legislature, in 1980, adopted these two substantial amendments to the obscenity statute. The exemption was for a number of activities (T.C.A. §39-6-1117) which included recognized and established museums, historical societies or any nonprofit association which collected and preserved historic or religious documents. Petitioners contend, as discussed hereafter, that such an exemption has no rational basis and violates Equal Protection so that Petitioners' convictions should be reversed and dismissed.

Petitioners Lucy M. Hunt and Guess What, Inc. were charged in four indictments with the distribution of obscene material in violation of T.C.A. §39-6-1104. Law enforcement officials

on February 20, February 28, March 3, and March 12, 1981 made purchases of ten magazines and films. Each of the four indictments and the ten counts therein were for the purchases on the particular day. For the purchases on February 28, the trial court granted a motion for judgment of acquittal on one count and the jury found the Petitioners not guilty of the remaining two counts. On the remaining three indictments, the jury found the Petitioners not guilty of three counts but guilty of the four remaining counts. The Court merged two counts of one indictment since it was a single sale or transaction. Lucy M. Hunt was sentenced to sixty (60) days on each count which the Trial Judge determined should run concurrently. Guess What, Inc. was fined \$15,000.00 on each count which, after the merger, resulted in a fine to the corporation of \$45,000.00. In summary, the guilty verdicts were on three films and one magazine and not guilty or judgments of acquittal granted in the remaining six films or magazines.

Petitioners filed a Motion to Dismiss and an Amended and Supplemental Motion to Dismiss in the trial court which raised the issue of classification of violators under T.C.A. §39-6-1104(e). The trial court overruled the motion. The Court of Criminal Appeals likewise ruled against the Petitioners and held the classification valid.

Lucy M. Hunt was identified as the clerk who sold the magazines or motion picture films to the law enforcement officers in each case. The total price of all of the articles sold in four visits resulting in the four indictments was approximately \$50.00. The total price of the material upon which guilty verdicts was obtained was approximately \$25.00 which resulted in the fines of \$15,000.00 each or \$45,000.00 against the corporation. Bank records were introduced for the purpose of showing the deposits of the Petitioner corporation during the month and particularly on the approximate days of the sales to the individuals. The bank records indicate approximately \$18,400.00 was deposited in a three month period which, if annualized,

would result in annual gross revenues of approximately \$75,000.00 per year. Tax records indicate that the bookstore paid the State of Tennessee approximately \$3,600.00 in revenue. Each \$15,000.00 fine against the corporation would represent approximately twenty percent (20%) of yearly gross income and the total fines would represent approximately sixty percent (60%) of gross income for the year.

A Motion for New Trial was filed which raised again the arbitrary classification of violators under the statute on behalf of Petitioner Hunt as well as other errors.

Petitioners appealed to the Tennessee Court of Criminal Appeals. Tennessee permits the raising of constitutional questions in a criminal matter at the appellate stage of the proceedings. petitioners had changed counsel and new counsel presented to the Court of Appeals the issue that the statutory exemption under T.C.A. 39-6-117 was overbroad and an arbitrary and improper classification. The Tennessee Court of Criminal Appeals affirmed the conviction of Petitioners on July 14, 1983. While the cause was under advisement, this Court on June 28, 1983 issued its decision of *Solem v. Helm*, ____U.S.____, 103 S.Ct. 3001. The Petitioners on behalf of Guess What, Inc. timely filed a Petition to Rehear challenging the fine as excessive under the Tennessee Constitution and the Eighth Amendment of the United States Constitution and that the punishment section authorizing a minimum fine of \$10,000.00 and a maximum fine of \$50,000.00 was also unconstitutional as authorizing excessive fines.

The Petitioners compiled a survey of the fines authorized under obscenity laws in other states to attach to the Petition to Rehear which is attached as Appendix F. The Petitioners subsequently filed a Supplemental to the Petition to Rehear on August 8, 1983 which contained an exhaustive list of the fines permissible under the Tennessee Code for misdemeanors which is attached as Appendix E. The Court of Criminal Appeals issued on August 8, 1983, the same day the supplement was fil-

ed, an order denying the Petition to Rehear. Subsequently, on August 18, 1983, the Court issued an order on the Supplemental on Petition to Rehear adhering to its original judgment.

A timely Application for Permission to Appeal to the Tennessee Supreme Court was filed on September 7, 1983 which raises all of the issues addressed herein. The Application for Permission to Appeal was denied on November 7, 1983.

An application for stay of the mandate was filed by the Petitioners and was granted to Petitioner Lucy M. Hunt releasing her from jail after serving approximately fifteen (15) days pending the disposition by this Court of her Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

1. **A Fine Of \$15,000.00 On A Misdemeanor Charge Of Obscenity And The Requirement Of A Minimum Fine Of \$10,000.00 Is Excessive And The Ruling Is Contrary To The Principles Established By The Court.**

The issue presented is the application of the Eighth Amendment to fines and whether the Eighth Amendment proscribes a \$15,000.00 fine for each misdemeanor violation of distributing obscene material. The further issue is whether the Eighth Amendment proscribes a minimum \$10,000.00 fine for a misdemeanor of distributing obscene material. This Court has applied the principle of proportionality to imprisonment but has not applied the "parallel limitations" to fines. "The test is explicit that bail and fines may not be excessive." *Solem v. Helm*, ___U.S.____, 103 S.Ct. 3001, 3009.

The Corporation's employee sold a magazine which was found obscene and the Corporation was fined \$15,000.00. Likewise, a sale of one film in another indictment resulted in a fine of \$15,000.00 and the sale of two films as a single transaction in a third indictment resulted in a third fine of \$15,000.00. The Tennessee statute requires a minimum fine of \$10,000.00 with a maximum fine of \$50,000.00. Punishment was assessed by the jury upon instructions by the Court of the minimum and maximum fines upon conviction. The total price of the four items upon which the Petitioner was found guilty was approximately \$25.00.

Article 1, Section 16 of the Tennessee Constitution is identical to the Eighth Amendment to the United States Constitution. It is permissible under Tennessee law to raise constitutional questions at any time during a proceeding, including for the first time on appeal. Rule 13(a), Tennessee Rules of Appellate Procedure, *Veach v. State*, 491 S.W.2d 81, and *Langford v. Vanderbilt University*, 287 S.W.2d 32, 199 Tenn. 398. When this Court decided *Solem v. Helm*, ___U.S.____, 103 S.Ct.

3001 (June 28, 1983), the Court of Criminal Appeals had heard argument and had this cause under advisement. It rendered its decision on July 14, 1983. Petitioners filed a Petition to Rehear raising the issue of excessive fines and disproportionate punishment and attached a summary of punishments permissible under obscenity laws in other jurisdictions (Appendix F). Petitioners then began compiling a comprehensive listing of all punishments of misdemeanors, both in the section of the Tennessee Code devoted to crimes as well as those listed throughout the Tennessee Code (Appendix E).

A timely Application for Permission to Appeal was filed with the Tennessee Supreme Court which raised the issue of excessive fines, and was denied.

The action of the Tennessee Court of Criminal Appeals in affirming the judgment and the action of the Tennessee Supreme Court in affirming the fines levied against Petitioner is contrary to the decision of this Court in *Solem v. Helm, supra*.

The fine levied against Petitioner Guess What, Inc. is disproportionate under the criteria set forth by this Court. The Tennessee Supreme Court has stated that the Tennessee constitutional provision on excessive fines and punishments is to be interpreted the same way as the United States constitutional provision. *Cozzolino v. State*, 584 S.W.2d 765 (1979). This Court should either review this fine for the purposes of giving guidance to courts for the consideration of excessive fines or should remand this cause to the Tennessee Court of Criminal Appeals for reconsideration in light of *Solem v. Helm, supra*. The Court should also consider or remand for consideration the issue of whether the minimum fine required by the statute would be excessive in view of the criteria established by the the Court.

One test is consideration of the gravity of the offense and the harshness of the penalty.

If the Tennessee court is correct that many persons or groups may be exempt from punishment for the distribution or sale of obscene material, then the offense is certainly not grave enough to warrant such an excessive fine or require such a large minimum fine. This Court has determined that "although there is no conclusive proof of a connection between anti-social behavior and obscene material, the legislature of Georgia could quire reasonably determine that such a connection does and might exist." *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 61, 93 S.Ct. 2628, 2637. The Court has recognized that a state may adopt a "laissez-faire" policy and some states do have more liberal laws than others concerning alleged obscenity. However, Petitioners recognize, as this Court has determined, that nothing in the Consitution prohibits a state from reaching a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data. The right to have obscene material in the privacy of the home was upheld in *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243. But this right does not extend to transporting, for private use or by private carriage, obscene material or bringing such material into this country. *U.S. v. Orito*, 413 U.S. 139, 93 S.Ct. 2674 and *U.S. v. Twelve 200ft. Reels of Super 8 mm film*, 413 U.S. 123, 93 S.Ct. 2665. The Court further stated that Congress could allow an exemption for private use.

Under the circumstances where exemptions are granted and private use is permissible, the conflicting legislative intentions are evident. The harm caused or threatened to society, and the small magnitude of the crime, indicate the harshness of the penalty under the first criteria.

The Tennessee legislature must be presumed to have had knowledge of the ruling of *Stanley v. Georgia*, *supra* when it adopted the enhanced penalty provisions and exemption provisions in 1980. The grossly disproportionate harshness of the penalty is made evident by the paradox of the legislature's grant of license and immunity to some institutions without a rational

basis for such a classification on the one hand and providing for the heaviest fine in the Tennessee Code for misdemeanors on the other hand for obscenity violations.

Appendix E, listing the fines available for other misdemeanors in Tennessee, conclusively demonstrates that the fine imposed of \$15,000.00 for each offense is significantly disproportionate to the crime and should be determined by the Court as prohibited by the Eighth Amendment.

The Tennessee Code provides that where the punishment for a misdemeanor is not otherwise detailed in the statute, the punishment shall be imprisonment of not more than one year or a fine not exceeding \$1,000.00. The offense of prostitution, including soliciting, procuring or aiding or abetting and assignation, is punished by a fine of \$50.00 for the first offense to a maximum of \$500.00 for the third offense (T.C.A. §39-2-634). A common law offense of public lewdness cognizable in Tennessee, *Grisham v. State*, 10 Tenn. 589 (1831), would be punishable by a maximum fine of \$1,000.00.

The conclusion is inevitable that the fine imposed for other misdemeanors is such that the fine levied against the Appellant of \$15,000.00 for each charge is disproportionate and therefore prohibited by the Eighth Amendment. The required minimum fine of \$10,000.00 is likewise excessive punishment.

The third criteria used by the Court in comparing punishment is to look at what is imposed for the commission of the same crime in other jurisdictions. A summary of the fines permissible in other jurisdictions for obscenity offenses is attached as Appendix F. Remembering that the minimum fine is \$10,000.00 and the maximum fine for this misdemeanor offense is \$50,000.00, an inspection of the table attached to Appendix F demonstrates that the Tennessee statute as well as the fine levied for the offense of violation of obscenity law is grossly disproportionate to all states which classify this type of offense as a misdemeanor. The State of Washington, which classifies

the offense as a felony, does permit a fine of between \$5,000.00 and \$50,000.00. The State of North Dakota does permit a fine for a misdemeanor of a maximum of \$15,000.00. Twenty-five states permit the levying of a fine on a first offense of no greater than \$1,000.00. Of those states classifying the offense as a misdemeanor, five permit a maximum fine of \$5,000.00 for the first offense and two permit a maximum fine of \$10,000.00 for the first offense. The minimum fine permitted and the fine levied herein are disproportionate punishment when considered under this objective criteria.

Petitioners acknowledge that *Solem* holds that the reviewing court should grant substantial deference to the broad authority of state legislators. However, this Court also holds that no penalty is per se constitutional. With due deference to the legislature, a consideration of the punishment in light of the objective criteria outlined by this Court clearly warrants this Court to review and determine that the punishment is excessive and in fact the required minimum fine would be excessive punishment. This is particularly so in view of three sales totaling approximately \$25.00 for three motion picture films and a magazine resulting in fines of \$45,000.00. The Tennessee court has decided this federal question in conflict with the applicable decision of this Court and the Petition should be granted.

2. The Exemption Of Certain Persons From Prosecution Under The Tennessee Obscenity Statute Is Arbitrary And Overbroad, And Contrary To Decisions Of The Highest Courts Of Other States And The Principles Established By This Court.

The exemption of certain persons and institutions from the provision of the Tennessee obscenity statute is overbroad, arbitrary and without rational basis. The exempt organizations may, without criminal liability, freely disseminate, sell, and profit *without limitation*. The exemption provides total immunity regardless of the use of the material, the amount distributed, or

the context in which it is used. The exemption has little or no relation to the ultimate purpose of an exemption. Equal Protection is violated in that there is no rational basis or relationship to a legitimate government interest. Undefined recognized and established museums, historical societies, educational institutions and any nonprofit association or entity which is engaged in the collection, preservation of historic documents are exempt without regard to use, amount or commercial activity.

There are other organizations listed, but all of these organizations are exempt regardless of the profits made or uses to which obscene material may be put and the statute presents no rational reason for such exemption.

A society on the history of sex could be recognized and established and visitors, for a fee, could visit and see examples both old and current. Copies could be sold without limit. Likewise, a museum could be recognized and established which could charge admission as well as sell examples. A nonprofit organization could be established for the collection and preservation of historic pornographic literature which could be shown for a fee and examples sold. The salaries that would be paid to the officers and employees of an otherwise nonprofit organization would encourage the commercial activities.

Possibilities are unlimited. The reason for an obscenity statute is to deter the distribution of obscene material. If the statute, however, recognizes an exemption based upon the type of organization, not the use, or any other legitimate reason for the distribution or use within the exempt organization, the exemption has no fair and reasonable relationship to the prohibition against the distribution of obscene material. The law would therefore operate differently upon the same class of people; *that is, those commercially selling or exhibiting obscene material*. A classification that is more lenient on some than on others, certainly cannot serve as a rational basis in the light of the government objective to punish the distribution of obscene material. The holding by the Tennessee courts is in conflict with the deci-

sion of the Supreme Court of Minnesota in *City of Duluth v. Sarette*, 283 N.W.2d 933 (1979). The exemption statute in Minnesota was similar and the Minnesota court found the exemption was deficient in that by providing total immunity for particular groups and institutions regardless of their use of the material or the context in which it is used, the city necessarily created arbitrary and overbroad classifications which have little relevance to the exemptions's ultimate purpose. 283 N.W.2d, 536. Our Tennessee court attempted to distinguish *Sarette* in that the exemption provision also provided an exemption based upon the status as a taxpayer. While this deficiency exacerbated the exemptions deficiency, the court held that the exemption, by providing total immunity regardless of use, created arbitrary and overbroad classifications.

Our Tennessee court holding is contrary to the exemption approved by the Maryland court in *400 East Baltimore St., Inc. v. State*, 431 A.2d 682 (1981). The Maryland statute exempted "persons having bona fide scientific, educational, governmental, or other similar justification for possessing such matter, or to distributions thereof pursuant to such justification." Maryland recognized that obscene material could be used for research, teaching, and clinical purposes.

This Court has held that the "commerce in obscene material" and the "exhibition of obscene material in places of public accommodation" was unprotected and subject to regulation. See *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 69; and *Kaplan v. California*, 413 U.S. 115, 120. The use of obscene material for those scientific and educational purposes provides a social utility to the obscene material that it does not otherwise possess and would be a reasonable classification. On the other hand, the Tennessee statute does not so limit the use, but merely exempts organizations which could, without limit, commercially use, exhibit, sell or distribute the material.

New York approved an exemption as an affirmative defense of obscene material disseminated "to persons or institutions

having scientific, educational, governmental, or other similar justification for possessing or viewing the same.” *People v. Illardo*, 399 N.E.2d 59 (N.Y. 1979). The statute requires that the dissemination to or the possession or the use be for scientific, education or other similar justification, which is consistent with this Court’s view that non-commercial dissemination for certain limited purposes is proper.

The Tennessee statute is, of course, contrary. Likewise, non-commercial dissemination as an exemption was approved by Delaware in *Gottlieb v. State*, 406 A.2d 270 (1979). The Tennessee statute would permit exempt organizations to commercially disseminate. The Tennessee statute is contrary to decisions of other state courts and to the principles enunciated by this Court.

3. The Classification Of Punishment For Violators Of The Obscenity Statute Has No Rational Basis And Is Vague And Indefinite, Contrary To Principles Established By This Court And Applied By The Highest Courts Of Other States.

The Tennessee statute providing for punishments of Class A and Class B violators is vague and indefinite in violation of Due Process. It is arbitrary and without a rational basis, in violation of the Equal Protection clause.

A Class B violator receives a mandatory sentence. A Class A violator is subject to parole, probation, suspension of sentence, work release and any other program available for prisoners.

The statute states a Class A violator shall be:

[A]ny person ... who distributes obscene books, magazines, newspapers, pictures, drawings, photographs, or other printed or written *material* when such obscene material represents twenty five percent (25%) or less of the stock-in-trade, *and* inventory, *and* sales of such violator

during any *given* twenty-four (24) hour period. A class B violator shall be any other person ... who is not defined as a class A violator. Upon application for sentencing as a class A violator, as defined above, such violator shall have the burden of proving his classification. (Emphasis supplied.)

Class A and Class B sentences operate differently on persons in like situations or circumstances. The classification is arbitrary. A classification based upon punishment of some sellers more lenient than other sellers or *exhibitors* has no rational basis.

The Tennessee court rejected the classification challenge stating the parameters of the classes are clearly set forth by the legislature and are sufficiently well defined for the courts to fairly administer the law. See *State v. Davis*, 654 S.W.2d 688 (1983). The court construed "matter" instead of "material" which is the word used in the statute to include not only books and magazines, but also movies, and determined that the 25% break point was where the legislature could legitimately draw the line to single out those offenders who deal more heavily in obscene matter and subject them to more severe punishment. The court failed to recognize the serious deficiencies in the attempted classification.

The attempted classification of A and B violators among other differences treats an *employee* differently from an *owner*. Only the owner can have "stock-in trade and inventory." A person as a violator can have "sales," both as an owner or as an employee. The classes are not "clearly set forth" but are arbitrary where an owner with less than 25% of "stock-in-trade and inventory and sales during any given twenty-four hour period" is treated differently than an employee. The statute is not clear if sales are to be sales of the employee only within a twenty-four hour period or of the entire establishment. Likewise, is the owner entitled to show all sales whereas his employee may only use the sales of the employee. What is the twenty-four hour period which is not defined. Is it merely a

given twenty-four hour period which could be classified as one callendar day regardless of the time of the sale?

While the Tennessee court attempted to say that motion picture and book store operators should be treated alike, a motion picture *exhibitor* does not have *sales* of the material, but only exhibits for a fee. Likewise, the movie exhibitor does not have an "inventory and stock-in-trade." Certainly live performances and theatrical productions have no "sales and inventory and stock-in-trade" and all live performance violators would be subject to mandatory sentences.

The "inventory and stock-in-trade and sales" is not *limited* to books, magazines, drawings, photographs or other printed or written material. A large store with other articles for sale can distribute obscene material knowing that it will always be a Class A violator because of its large inventory and sales. The obscene "matter" being disseminated or exhibited in the large store may be substantially worse than the article sold or exhibited by the adult bookstore which sells only books and magazines. A motion picture exhibitor would have to show four or more features to qualify as a Class A violator with less than 25% obscene stock-in-trade and inventory if the statute can be properly applied to motion picture exhibitors.

The use of the word "and" must be given significance. The "obscene material" must represent 25% or less of the "stock-in-trade *and* inventory *and* sales of such violator during any given 24-hour period." It is impossible for a person of common intelligence to understand the classification of the statute. It is not "clear" as determined by the Tennessee Court, and violates the principles of Equal Protection and Due Process established by this Court.

Although classification of offenders have been upheld, the classifications have totally exempted certain individuals from punishment, such as projectionists. See *State v. Leiseure*, 404 A.2d 457 (R.I., 1959). Maryland's attempt to expand the ex-

emption to all motion picture employees as opposed to clerks or employees of the bookstore was arbitrary and violated Equal Protection. *Wheeler v. State*, 281 Md. 593, 380 A.2d 1052.

The Tennessee statute violates the traditional Equal Protection analysis. It is patently arbitrary and bears no rational relationship to a legitimate government interest. Interpretation by the Tennessee Court to include both motion pictures and bookstores does not clarify the poor draftmanship so the Courts can "fairly administer the law." It is too nebulous, lacks definite limits and is too vague to inform a man of common intelligence who is included or not as a Class A violator.

Even if the sentencing classification scheme could be construed to have a rational basis and be capable of reasonable application, the Petitioner Hunt would be required to waive her right not to be a witness against herself by asserting all other sales consisted of less than twenty-five percent (25%) obscene material and the inventory and stock-in-trade consisted of less than twenty-five percent (25%) obscene material.

The mandatory sixty (60) day sentence also raises the elements of disproportionality. The Court, if it remands the fine and other issues for reconsideration, will also cause the Tennessee Court to apply the principles to the mandatory sentences with similar results.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the Court of Criminal Appeals of Tennessee. Petitioners request that the Court grant review on the merits, or make an appropriate summary disposition by remanding the cause to the Court of Criminal Appeals for consideration in light of *Solem v. Helm, supra*, and also reverse the decision of the Tennessee Court on the exemption and classification issues.

Respectfully submitted,

Stephen D. Wakefield
2000 First Tennessee Building
Memphis, Tennessee 38103
(901) 526-2000

Attorney for Petitioner

APPENDIX

APPENDIX A
IN THE COURT OF CRIMINAL APPEALS
AT JACKSON

MARCH 1983

State of Tennessee,
Appellee

vs.

Lucy M. Hunt,
Guess What, Inc.,
Appellants

No. 45, Shelby Criminal

Honorable L. T. Lafferty, Judge

(Obscenity Law)

FOR THE APPELLANTS:

Heiskell, Donelson, Bearman,
Adams, Williams & Kirsch
2000 First Tenn. Bldg.

Michael F. Pleasants
2000 First Tenn. Bldg.
Memphis, Tenn.

Hunt:

Alan Lubin
140 Jefferson Ave.
Memphis, Tenn.

Tommy H. Jagendorf
5118 Park Ave.
Memphis, Tenn.

FOR THE APPELLEE:

William M. Leech, Jr.
Attorney General
Nashville, Tenn.

Jennifer Helton Small
Assistant Attorney General
Nashville, Tenn.

Mrs. Kathleen O. Spruill
James Beasley
Assistant District Attorneys
201 Poplar Ave., 3rd Floor
Memphis, Tenn.

Guess What, Inc.:

Charles Boyle
Suite 100 South
Atlanta, Georgia

AFFIRMED

LLOYD TATUM, JUDGE

OPINION RELEASED: July 14, 1983

Opinion

This is a case under the present Tennessee obscenity statutes (T.C.A. §39-6-1101, et. seq.). The first indictment, B-82306, charged the defendant Lucy M. Hunt in two separate counts with knowing distribution of two obscene films—a film entitled "Virgin Ass" and an untitled color film depicting other sexual conduct. Guess What, Inc., was charged in two additional counts of that indictment with knowing possession with the intent to distribute the above-mentioned films. Defendant Hunt was convicted of both of these counts and was sentenced to 60 days in jail on each count. Defendant Guess What, Inc., was convicted of both counts and was fined \$15,000.00 on each count. However, the record reflects that these two films were sold in a single transaction, so the trial judge merged the two convictions against each defendant. Hence, only one judgment was entered against each defendant under indictment B82306.

Defendant Hunt was charged in another indictment, B-82307, of knowing distribution of two additional obscene films, "Breakfast in Bed" and Orange Blossom Summer." The distribution of these films was charged in separate counts. Hunt was also charged with the knowing distribution of an obscene magazine, "Shaved Dolls" in another count of the indictment. Defendant Guess What, Inc., was charged in separate counts of knowing possession with the intent to distribute obscene

material which were the above-mentioned films and magazine. The jury found both defendants not guilty regarding the film "Breakfast in Bed" and the magazine "Shaved Dolls." However, both defendants were found guilty of their respective charges relating to "Orange Blossom Summer." As a result, Hunt was sentenced to 60 days in jail and Guess What, Inc., was fined \$15,000.00.

In another indictment, B-82316, Hunt was charged and found guilty of distributing an obscene magazine, "No. 1 Prive." She was sentenced on that charge to 60 days in jail. Guess What, Inc., was convicted in another count of possession with intent to distribute that magazine and fined \$15,000.00. Both defendants were found to be not guilty to charges in a fourth indictment, B-82305. As to the punishment imposed, all of Hunt's sentences were to run concurrently. The fines imposed against Guess What, Inc., were imposed cumulatively on each indictment which resulted in a total fine of \$45,000.00. The convictions under each indictment represented separate sales.

In the first issue, the defendants state that the trial court erred in charging the jury with T.C.A. §39-6-1117. The defendants state that this jury charge negated testimony of a defense expert witness who testified concerning the scientific value of the material.

The expert was Dr. Eugene E. Levitt, a clinical psychologist who is the director of psychology in the Department of Psychiatry at the University of Indiana School of Medicine. It appears that he also practices clinical psychology. Dr. Levitt testified that he had viewed the materials for which the defendants were convicted of distributing. He testified that similar materials are prescribed in treating persons with "sexual disfunction." This type material sexually stimulates these patients. He also testified that similar material was sometimes used in teaching human sexuality to undergraduate college students at Indiana University. This material was useful in demonstrating sexual activity to the students. The films and

magazines demonstrated sexual intercourse, fellatio, cunnilingus, oral sexual activity, masturbation, homosexual female sexuality, and other activities.

The witness testified that such explicit materials would best be used for educational purposes under the supervision of a teacher and that treatment of patients with such materials should be "in a clinical setting with control." Dr. Levitt testified that he would classify nothing as obscene that is found in an adult bookstore or in a private home, or at any other place where "no one needs to go." He emphasized that the material had scientific value for the treatment of sexual disorders and in teaching courses in human sexuality.

T.C.A. §39-6-1117, of which the defendants complain, was charged to the jury, is as follows:

"§39-6-1117. Persons and institutions exempt from provisions.—There shall be exempt from the provisions of this chapter:

(1) Any public library which is entirely or partially supported by public funds;

(2) Any recognized and established educational institutions and the libraries therein;

(3) Any recognized and established museum;

(4) Any recognized and established historical society;

(5) Any licensed practitioner of the healing arts, medical clinic or hospital while engaged in a professional capacity;

(6) Any governmental agency;

(7) Any governmental sponsored organization;

(8) Any other nonprofit association or entity which is engaged in the collection and preservation of historic or religious documents; and

(9) Any person, employee or agent acting in an official capacity for such organization.”

The defendants insist that since the materials were purchased in their adult bookstore, and that they did not claim an exemption under T.C.A. §39-6-11-7, that the code section should not have been charged. We find that the testimony of Dr. Levitt warranted the charge. The use made of similar materials by Dr. Levitt for education and scientific purposes was authorized by subsections (2) and (5) of the exemption statute. It was relevant for the jury to be apprised that the scientific uses postulated by Dr. Levitt were given specific protection from prosecution. This instruction provided an appropriate guideline for the jury in examining whether the material had protected uses or whether their sale was unprotected “commercial exploitation of obscene material.” See *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973). The instruction in no way impeached the veracity of the testimony of Dr. Levitt; it did no more than fully acquaint the jury with the law of the case. There is no merit in this issue.

The defendants next complain that the trial judge improperly refused to instruct the jury in accordance with their special request number 14. This issue was waived because it was not included in the defendants’ motion for a new trial. *State v. Simerly*, 612 S.W.2d 196 (Tenn.Cr. App. 1980); *State v. Pennington*, 573 S.W.2d 755 (Tenn. Cr.App. 1978); Rule 36(a), T.R.A.P.

The defendants assert that the definition of obscenity under T.C.A. §39-6-1101(5) is vague and indefinite. They also assert that Article I, Section 19 of the Tennessee Constitution may be interpreted as granting absolute protection of speech and press which would forbid any regulation of pornography. Our Supreme Court has held that this particular section of the statute to be constitutional. *Taylor v. State, ex. rel. Kirkpatrick*, 529 S.W.2d 692, 696 (Tenn. 1975). Our Supreme Court having addressed this issue, its determination is conclusive and binding on this court and all other inferior courts of this State. *Barger v. Brock*, 535 S.W.2d 337, 340 (Tenn. 1976). As a result of these

holdings and *Leech v. American Booksellers Association, Inc.*, 582 S.W.2d 738, 745 (Tenn. 1979), we see no reason to extend an interpretation of Article I, Section 19 of the Tennessee Constitution to forbid the regulation of pornography.

The defendants complain that the exemption of certain persons and institutions from the provisions of the obscenity statutes is unconstitutional. T.C.A. §39-6-1117, above quoted, exempts certain persons and institutions from the provisions of the obscenity statute. The defendants attack this exemption as being overbroad and an unconstitutional classification. They claim that this statute violates the equal protection clause and the due process clause. We disagree.

This statute was adopted after our Supreme Court struck down an earlier exemption provision in the Tennessee Obscenity Act of 1978. *Leech v. American Booksellers Association, Inc.*, *supra*, at 755. That exemption provision was constitutionally vague since the exempt status was tied to whether an entity was taxed or not. That framework was "too nebulous, too lacking in definite limits, and too vague to inform men of common intelligence who was included and who is exempt from the criminal penalties..." of that particular act. T.C.A. §39-6-1117 is not tied to the admittedly obscure question of tax status. Under this statute specific institutions are recognized and delineated as exempt from the act. The legislature has supplied to us in this provision a readily identifiable class that is to be exempt from the obscenity statutes.

The defendants say that this exemption is overbroad and thereby violates equal protection in that it provides total immunity to exempted groups regardless of the use of the material, the amount distributed, or the context in which it is used. Our general assembly is not prohibited from exempting certain individuals and institutions from the provisions of its statutes as long as it has a rational basis of doing so and if the exemption is not imposed arbitrarily. *State v. Nashville, Chattanooga and St. Louis Railroad*, 124 Tenn. 1, 135 S.W. 773 (1911). T.C.A.

§39-6-1117 has a rational basis in exempting certain persons and institutions from obscenity violations in view of serious literary, artistic, and scientific achievements which may occur from those groups. The exemption was not imposed arbitrarily and is equally applicable to all persons or institutions in the exempted class. Such an exemption furthers "important governmental objectives... (and is) substantially related to the achievement of those objectives." *Orr v. Orr*, 440 U.S. 268, 279, 99 S.Ct. 1102, 1111, 59 L.Ed.2d 306, 319 (1979); *Mitchell v. Mitchell*, 594 S.W.2d 699 (Tenn. 1980).

This statute is not overbroad because of the specific delineation of the individuals of whom are exempted. Those within the exempted class are treated equally and it is a valid exercise of the police power of the State to grant certain exemptions from the operation of general laws. 16A, C.J.S., *Constitutional Law*, §465. We find no real or substantial overbreadth here that would violate the Federal Constitution. See *Broaderick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); *City of Chattanooga v. McCoy and Combs*, 645 S.W.2d 400 (Tenn. 1983). Likewise, there is no improper classification of those individuals who are exempt. This is not analogous to the situation of *Wheeler v. Maryland*, 281 M.D., 593, 380 A.2d 1052 (1977), where a statute differentiated between bookstore employees and motion picture employees. The exempt class under our statutes bears a rational relationship towards a legitimate government interest of protecting activity which may be obscene in certain specific instances.

We adopt the holdings of *State v. Shearon Davis and Guess What, Inc.*, (Tenn.Cr.App.; released at Jackson, 3/17/83) which found that although the term "recognized and established" under this statute is not absolutely precise, this lack of precision in itself was not offensive to the requirements of due process. *Roth v. United States*, 354 U.S. 476, 491, 77 S.Ct. 1304, 1312, 1 L.Ed.2d 1498 (1957). We agree that this statute is not so vague as to be a violation of due process of law. We find

that the exemptions set forth in the above-mentioned statute are not overbroad or improperly classed. The statute is constitutional.

We further adopt the holdings of *Shearon Davis, supra* with regard to the constitutionality of the punishment provisions of T.C.A. §39-6-1104(e) and (f). Both provisions, which allow distinct punishments for A and B classes of offenders, do not violate the equal protection clause or the due process clause. These portions of the statute provide that:

“(e)(1) For purposes of this subsection, a Class A violator shall be any person sentenced under the provisions of subsection (d) who distributes obscene books, magazines, newspapers, pictures, drawings, photographs or other printed or written material when such obscene material represents twenty-five percent (25%) or less of the stock-in-trade, and inventory, and sales of such violator during any given twenty-four (24) hour period. A Class B violator shall be any other person sentenced under the provisions of subsection (d) who is not defined as a Class A violator. Upon application for sentencing as a Class A violator, as defined above, such violator shall have the burden of proving his classification.

(2) The sentences imposed in subsection (d) of this section shall be mandatory for a Class B violator, and no Class B violator sentenced under the provisions of such subsection shall be eligible for suspension of sentence and probation, release on parole, or any other program whereby such person enjoys the privilege of supervised or unsupervised release into the community or whereby such person is released, permanently or temporarily, prior to the expiration of his sentence, including, but not limited to, participation in any programs authorized by §§ 41-21-208 or 41-21-227. Provided, further, no Class B violator sentenced under subsection (d) of this section shall receive good, honor or incentive time credit towards the

expiration of such sentence as authorized by §§ 41-21-212, 41-21-214 or 41-21-228; nor shall such sentence expire in any other manner until it has been entirely served day for day.

(f) Any corporation or entity doing business in the state of Tennessee which violates the provisions of this section shall, upon conviction, be fined an amount of not less than ten thousand dollars (\$10,000) nor more than fifty thousand dollars (\$50,000)."

In response to similar argument, our court found that this statute indeed had a rational relationship to a legitimate government interest and was not just arbitrary. *Shearon Davis, supra* held:

"Our Supreme Court has upheld the power of the general assembly to distinguish among the degrees of wrongdoing under a particular statute and to punish violators according to the extent to which their conduct deviates from the social norm. In *State v. Hinsley*, 627 S.W.2d 351, 355 (Tenn. 1982), our Supreme Court upheld the constitutionality of our habitual drug offender statute which punished more severely drug dealers 'whose conduct causes a more serious threat to our society' than the conduct of only users. Such a classification was held to bear a rational relationship to legitimate governmental interests in the deterrence of the traffic in illicit drugs.

In this case the Legislature has chosen to single out those offenders who deal more heavily in obscene material and subject them to more severe judgment punishment. Under the statute, the breakpoint between Class A and Class B violators is 25% of the stock in trade, inventory and sales of the violator during any given 24-hour period."

The defendants assert that the distinction between A and B offenders derived from the percentage of obscene matter of

which the business is composed, is purely arbitrary. To support their position, they cite *City of Duluth v. Sarette*, 283 N.W.2d 533 (Minn. 1979), which held an exemption provision to be arbitrarily imposed which excluded from prosecution organizations that received at least one-third of their support from publicly donated funds. That provision was arbitrary and without any rational basis because it was not readily apparent why any organization receiving more than one-third of its support from publicly donated funds would be more likely to have a legitimate need to disseminate obscene materials than one receiving a lower percentage of support from the public. That is not an analogous situation to the separate classification of offenders based upon the percentage of obscene materials that they have in their business. The 25% figure is not an arbitrary amount in that it will insure that the offenders who deal primarily in obscene materials will be subjected to more severe punishment than those who do so only as a small incidental portion of their business.

We further hold that the punishment section of T.C.A. §39-6-1104(e) and (f) does not unconstitutionally distinguish between those who sell obscene printed matter and those who sell obscene movies. This section must be read *in pari materia* with T.C.A. §39-6-1101(4) which defines obscene "matter" to include motion picture films. By utilizing this definition, we do not interpret this statute to distinguish between printed matter and movies. We also hold that the perimeters of the Class A and Class B offenders are sufficiently well defined for the courts to fairly administer the law.

The defendants in our case also challenge T.C.A. §39-6-1104 (f) which subjects corporate defendants to a fine. On this question we again adopt the language of *Shearon Davis, supra*, which held:

"The appellants complain that because the term 'entity' is not defined, the statute is unconstitutionally vague. However, the proof clearly revealed that Guess What,

Inc., is a corporation and the statute specifically addresses 'any corporation.' The corporate appellant has no standing to complain of any shortcomings of this code section as it might be applied to some other business entity. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, ____ U.S. ____, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982).

It is not a proper function of appellate courts to envision in advance of application all possible contingencies of attempted prosecution under a criminal statute and declare which are constitutional and which are not. *State v. King*, 635 S.W.2d 113, 114 (Tenn. 1982), citing *Watson v. Buck*, 313 U.S. 381, 402, 61 S.Ct. 962, 967, 85 L.Ed. 1416 (1941). T.C.A. §39-6-1104(e) (1) (2) and (f) are constitutional in every respect, and this issue and the subissues have no merit."

We hold that the provisions of each one of the statutes questioned by the defendants are constitutional.

In their final issue, the defendants assert that the material upon which their convictions rest, is not obscene as a matter of law. We have viewed the films and magazine upon which the defendants were convicted utilizing the factors of T.C.A. §39-6-1101 as approved by *Taylor v. State, ex. rel., Kirkpatrick, supra*. This material clearly falls within the definition of "obscene" under the statute, in that an average person, applying contemporary community standards, would find that each of the materials, taken as a whole, appealed to the prurient interest; that the magazine and each film depicted sexual conduct in a patently offensive way; and that each of the materials, taken as a whole, lacked serious literary, artistic, political, or scientific value. As such it may be regulated since it falls outside the protection of the First Amendment. *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). We hold that the jury properly applied the factors of T.C.A. §39-6-1101 and affirm their decision that the materials are obscene.

We have fully considered all the issues raised by the defendants and find them to be without merit. The judgments are affirmed.

/s/ Lloyd Tatum, Judge

CONCUR:

/s/ Joe D. Duncan

IN THE COURT OF CRIMINAL APPEALS OF
TENNESSEE AT JACKSON

No. 45

Shelby County

State Of Tennessee,

Appellee

v.

Lucy M. Hunt,

Guess What, Inc.,

Appellants

Concurring Opinion

(Filed July 14, 1983)

As the majority opinion notes, the jury in this case implicitly found that three of the four films submitted were legally obscene but that the fourth, entitled "Breakfast in Bed," was not. After reviewing all four films, I can only conclude that this last film is equally as pornographic as the other three, and that the jury's clearly inconsistent verdicts, while not illegal under state law, are nothing short of serendipitous.

The obvious caprice involved in the process of applying "community standards" to determine which pornographic items violate state regulations and which do not suggests to me an excellent reason for interpreting Article 1, Section 19 of the Tennessee Constitution to protect from censorship materials such as those involved in this case (especially where the record shows that no children have been solicited or exploited in connection with the defendants' activities, or in any of the materials which are the focus of this prosecution.) Were the state constitutional question open for me to decide, I would so hold.

But the question is not an open one. Our Supreme Court specifically addressed this issue in *Leech v. American Booksellers Ass'n., Inc.*, 582 S.W.2d 738 (Tenn. 1979), and decided to adhere to the federal constitutional standards adopted by the United States Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), despite the court's recognition that it had the authority to "interpret Article I, §19 as granting absolute protection to speech and press and forbid any and all regulation of pornography in Tennessee." *Leech v. American Booksellers Ass'n., Inc.*, *supra*, at 745.

With the state constitutional question thus foreclosed, I conclude that I have no recourse but to concur in the result reached by the majority in this case.

/s/ Martha Craig Daughtrey, Judge

APPENDIX B
IN THE COURT OF CRIMINAL APPEALS
AT JACKSON

March 1983

No. 45, Shelby Criminal

State Of Tennessee,
Appellee

vs.

Lucy M. Hunt,
Guess What, Inc.,
Appellants

Order On Petition To Rehear

(Filed August 8, 1983)

The defendants have filed a Petition to Rehear. After considering the same, we find it to be without merit and it is overruled.

Enter, this 8th day of August, 1983.

/s/ Lloyd Tatum, Judge

/s/ Joe D. Duncan, Judge

Martha Craig Daughtrey, Judge

APPENDIX C

**IN THE COURT OF CRIMINAL APPEALS
AT JACKSON**

No. 45, Shelby Criminal

State Of Tennessee

vs.

**Lucy M. Hunt and
Guess What, Inc.**

Order On Supplement To Petition To Rehear

(Filed August 18, 1983)

The appellant has filed a supplement to the petition to rehear. After considering it, we adhere to our original judgment on the petition to rehear.

/s/ Lloyd Tatum, Judge

CONCUR:

/s/ Joe D. Duncan, Judge

Martha Craig Daughtrey, Judge

APPENDIX D

**IN THE SUPREME COURT OF TENNESSEE
AT JACKSON**

Shelby Criminal

C.C.A. No. 45

**State Of Tennessee,
Plaintiff-Appellee,**

vs.

**Lucy M. Hunt and
Guess What, Inc.,
Defendants-Appellants.**

Order

(Filed November 7, 1983)

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be and the same hereby is denied at the cost of appellants.

PER CURIAM

Fones, C.J., not participating.

APPENDIX E

I. Criminal Code Misdemeanors

Offense	T.C.A. Section	Fine
Assault Against Spouse	§39-2-105	M*
Assault Against Protective Serv. or Human Serv. Investigator	§39-2-108	M
Atty. Become Surety for Appearance of Criminal (D)	§39-6-1201	M \$25 to \$50
Bail Jumping of Misdemeanor Offense	§39-5-720	\$50
Baiting of Animals	§39-3-105	M\$50
Destroy or Injure Monuments, Fences, or Structures on Battlefields	§38-3-1308	M \$100
Cutting Away, Injuring, or Destroying Watercraft	§39-6-1608	M

* "M" indicates a misdemeanor offense declared to be such by the referenced statute, but with no punishment or fine mentioned in the statute. In such cases T.C.A. §39-1-302 provides a fine of not more than \$1,000 and imprisonment in the county jail or workhouse for not more than one year.

Alteration of Serial Number on Boat	§39-3-943	M \$1,000
Bribery of Other than Public Officers to Obtain Place of Trust	§39-5-111	M
Acceptance of Bribe by Officer or Employee of Carrier	§39-5-113	M \$25 to \$100
Bribery of Officer or Employee of Carrier	§39-5-113	M \$25 to \$100
Acceptance of Bribe by Witness	§39-5-116	M
Bribery of Witness (if civil or misdemeanor proceeding)	§39-5-115	M
Manufacture, Sale, or Distribution of Products Containing Butyl Nitrate	§39-6-453	M
Injure or Deface Campgrounds	§39-3-1309	M
Defacing or Injuring Material in Caves and Caverns	§39-3-1326	M \$10 to \$1,000
Opening Grave With Intent to Steal	§39-6-704	M

Child Abuse and Neglect	§39-4-401	M
Officer Speculating in State or City Claims--Conflict of Interest	§39-5-410	M
Officer Purchasing at Own Sale--Conflict of Interest	§39-5-411	M
Conspiracy	§39-1-603	M
Failure to Report Discovery of Dead Body or Parts Thereof	§38-1-105	M
Mutilation of Dead Body	§39-6-704	M
Purchasing or Receiving Body Illegally Disinterred	§39-6-706	M
Removing Dead Body From Grave	§39-6-703	M
Removing or Disturbing Body or Other Articles at Scene of Death	§38-1-102	M
Putting Dead Body in Spring Well, Cistern, or Running Water	§39-6-1614	M

Failure of Sheriff to Remove to Penitentiary Prisoner Condemned to Death	§39-5-427	M \$100 to \$500
Debt Adjuster Penalty	§39-6-1208	M \$500 to \$1,000
Destroy, Injure, or Secreting Property or Papers of Another	§39-3-1306	M
Substitution of Drugs in Filing Prescriptions Prohibited	§39-6-451	M \$25 to \$100
Endurance Contests Prohibited	§39-6-101	M \$50 to \$500
Aiding and Abetting Escape From Workhouse or Jail	§39-5-707	M
Penalty for Unlawful Delivery for Extradition	§39-5-424	M \$1,000
False Fire Alarm	§39-3-227	M \$10 to \$500
Destruction or Alteration of Serial Number on Farm Implement	§39-3-942	M
Manufacture Without Serial Number (Farm Implement)	§39-3-942	M

Receiving Fee Greater Than Permitted by Law	§39-5-406	M
Cutting or Damaging Wire Fences	§39-3-1323	M \$10 to \$25
Pulling Down or Opening Fences of Another Without Permission	§39-3-1322	\$2 to \$10
Prohibit Advertisement with Flag	§39-5-845	M \$100
Defilement of Flag	§39-5-845	Fine of \$3,000
Flouroscope Shoe-Fitting Device Prohibited	§39-6-106	M \$10 to \$500
Manufacture or Sale of False Slugs or Devices	§39-3-821	M \$100 to \$500
Publication or Sale of Secret or Ritualistic Work of Secret Organization	§39-6-505	M \$10 to \$50
Sale or Possess of Spurious Rituals or Secret Work Unlawful	§39-6-507	M \$5 to \$50
Penalty for Failure to Haul Waste Material in Closed or Covered Space	§39-3-1009	M \$25 to \$250

Glue Sniffing	§39-6-452	M
Assuming Official Character	§39-5-302	M
Traveling on Levees		M
Libel	§39-2-403	M
Violation of Litter Provision	§39-3-1006	3rd Offense M \$50 to \$500
Purchase of Lottery Tickets	§39-6-624	M \$100
Sale of Lottery Tickets	§39-6-624	M \$500
Masked Persons Disturbing Peace or Alarming Citizens	§39-2-703	M \$100 to \$500
Acting Deaf or Mute to Solicit Sales or Contributions	§39-6-1521	M \$500
Removal of Boundary Monument	§39-3-1310	M
Nuisance in Capitol	§39-6-342	M \$5 to \$20
Pollution of Water Supply of City or Town	§39-6-1612	M

Public Nuisance--Cause Filth to Collect	§39-6-1613	M
Obscene Phone Calls	§39-6-1102	M \$1,000
Obscenity, Selling (Person) (1st Offense) (2nd Offense) (3rd Offense)	§39-6-1104	M M Felony
Obscenity, Selling (Corporation)	§39-6-1104	\$10,000 to \$50,000
Allowing Unauthorized Privileges to Prisoners	§39-5-428	M \$500
Attempt to Suborn Perjury	§39-1-502	M
Physicians' Division of Fees	§39-6-1202	1st Offense \$25 to \$500 2nd Offense \$1,000
Neglect of Duty by Officer	§38-3-107 §38-3-111	M M
Refusal to Obey Aid to Officers	§38-3-106	M
Distribute Circular, Newspaper, or Magazine Without Name of Publisher	§39-3-952	M \$500 to \$1,000

Tamper with Metering Device	§39-3-939	M
Retailing Unlawfully Recorded Devices	§39-3-1129	M
Violation of Restrictions of Abandoning Airtight Restrictions	§39-6-104	M \$200
Violations of Safety Device Requirements	§39-6-105	M \$200
Failure to Report Certain Types of Injuries	§38-1-103	M
Unlawful Disposal of Raw Sewage	§39-6-103	M \$5 to \$50
Handling Snakes as to Endanger Life	§39-6-102	M \$50 to \$150
Solicitation of Expendation of Funds to Finance Litigation of Others:		
(1) Failure to File Information	§39-6-1503	Corp. \$10,000 fine Person M
(2) Acting as Agent in Violation	§39-6-1504	M

Ticket Scalping	§39-6-1301	M \$50 to \$500
Barbering on Sunday	§39-6-1201	M \$25 to \$50
Vagrancy	§39-6-302	M
Tapping Water Line Without Consent	§39-3-110	M \$50 to \$500
Purchase Scrap Metal or Jewelry for Resale or Remount Registration	§38-1-204	M \$100 to \$500
Appointment of Applicant to Government, Entry Below Minimum Standard	§38-8-105	M \$1,000
Violation of Orders of Chief Administrative Officer in Emergency	§38-9-105	M \$50
Solicitation of Misdemeanor	§39-1-404	M
Neglect by Train Operator Resulting in Wounding	§39-2-119	M
Prostitution Including Soliciting, Procuring or Aiding or Abetting and Assignment	§39-2-634	Fine 1st \$50 3rd \$500

Prowling or Traveling for Purpose of Destroying Property	§39-2-706	M \$50 to \$100
Cruelty to Animals	§39-3-104	M
Failure to Feed or Water Impounded Animals	§39-3-106	M
Carrying Animals in Inhuman Manner	§39-3-108	M
Aid and Promote Cruelty to Animals	§39-3-110	M
Keeping Sheep Killing Dogs	§39-3-116	M \$5 to \$25
Violation of Homestead Rule	§39-3-120	M
Injury to Livestock at Public Sale	§39-3-122	M \$25 to \$50
Negligently Setting Fire	§39-3-221 <i>et seq.</i>	M \$10 to \$50 Maximum M
Passing Bad Check under \$100	§39-3-08	M \$500
Possession, Sale, or Use of False Measure	§39-3-915	M 1st \$10 to \$30 2nd \$50 to \$100

Fraudulent Packing of Articles of Trade or Produce	§39-3-917	M \$50 to \$500
Substitution of Brands of Soft Drinks	§39-3-920	M \$5 to \$50
Name of Grower or Packer Required on Produce Containers	§39-3-921	M \$25
Altering Brands on Saw Logs in Streams	§39-3-924	M \$50
Plugging or Wedging Ends of Logs	§39-3-925	M
Removal of Personal Property from State Subject to Security Interest Less than \$50.	§39-3-926	M
Obtaining Telephone or Telegraph Service by Fraud	§39-3-935	M
Possession, Use, or Transfer of Devices for Theft of Telephone Service	§39-3-936	M
Fraudulent Operation of Coin Machine	§39-3-937	M \$100 to \$500

Exhibit False, Fake, or Forged Item	§39-3-947	M
Trespass on School or University	§39-3-1204	M
Take Illegal Possession of Schoolhouse or Charitable Institution	§39-3-1208	M
Loitering on Church or School, Dwelling, Business	§39-3-1209 §39-3-1210	M \$20 M \$100
Malicious Mischief	§39-3-1301	M
Injure or Deface Building or Fixture	§39-3-1302	M
Remove Products of Land	§39-3-1303	M
Aiding and Abetting Commission of Misdemeanor	§39-1-303	Punished as Offense
Attempt to Burn Property	§39-1-505	M, No Fine,
Conspiracy "General"	§39-1-601	M
Maim or Kill Domestic Animal	§39-3-103	M

Shoplifting (value not exceed \$100)	§39-3-1124	\$300
Altering Price Tag (value not exceed \$200)	§39-3-1124	\$300
Criminal Trespass	§39-3-1201	M
Trespass School Building	§39-3-1203	M
Abandonment of Dogs or Cats	§39-3-121	M \$2 to \$50
Trespass on Railroad Trains	§39-3-1211	\$5
Injure Dogs Used in Law Enforcement (horse also)	§39-3-310	M \$100 to \$500
Vandalism	§39-3-1325	M \$2 to \$50
Negligent Burning	§39-3-222	M
Pass/Draw Bad Check (less \$100)	§39-3-301	M, \$500
Divert Electric Power with Intent to Defraud	§39-3-938	M \$100 to \$5,000
Misrepresent Mileage on Used Motor Vehicle	§39-3-940	\$100

Alteration of Manufacturer's Permanent Identification Number	§39-3-941	M \$1,000
False Statement to Obtain Credit	§39-3-950	\$50
Failure to Support Disabled Spouse	§39-4-101	M
Failure to Provide Care for Child	§39-4-102	M
Expose Child to Inclement Weather	§39-4-402	No Fine
Leaving Child Locked in House or Room	§39-4-403	M \$5 to \$50
Disseminate Tobacco to Minor	§39-4-412	\$500
Acquisition of Tobacco by Minor	§39-4-413	\$500
Tobacco for Minors Penalty	§39-4-418	\$500
Permit Minor to Play Pool	§39-4-419	M \$10
Minors Use of Game Machine	§39-4-420	\$25 to \$50
Tattooing of Minors	§39-4-421	M
Official Oppression	§39-5-404	\$1,000

Resist Service of Process	§39-5-502	M
Smoke or Poisonous Gas to Hinder Arrest	§39-5-505	\$50 to \$500
Repossession After Legal Ejection	§39-5-503	\$5 to \$50
Rescue of Person in Lawful Custody (if offense was Misdemeanor)	§39-5-701	M
Escape from Jail if Guilty of Misdemeanor	§39-5-706	M
Aid or Assist Escape of Other Detainees (if detained for non-felony)	§39-5-708	M
Unhealthy Nuisance by Trade	§39-6-1003	M
Charge for Use of Public Toilet	§39-6-107	\$100 to \$500
Sexual Material less than 5 Feet from Floor	§39-6-1136	M \$50
Disrupt Performance of Sporting Event	§39-6-1304	M \$50

Carrying Dangerous Weapons	§39-6-1701	M \$50 to \$100
Carrying Knife Exceeding 4 Inches Disposal of Dangerous Weapon	§39-6-1703	M \$10 to \$100
Disposal of Dangerous Weapon	§39-6-1704	M \$100 to \$500
Throw Object at Train, Bus, or Watercraft	§39-6-213	M \$50 to \$500
Disturb Peace 1st Offense 2nd Offense	§39-6-301	M \$20 to \$200 \$50 to \$500
Throw or Cast a Missile	§39-6-304	M \$1,000
Disturb Assembly	§39-6-305	\$50 to \$500
Obstruct School Entry	§39-6-309	M
Induce Children to be Absent from School to Demonstrate	§39-6-343	M
Distribution of Less than ¼ Ounce of Marijuana	§39-6-417	M
Unlawful Possession of Controlled Substances	§39-6-417	M

Gambling	§39-6-610	M
Promote Gaming	§39-6-611	M
Keep Gambling House	§39-6-612	M \$50 to \$500
Possession of Gambling Device	§39-6-615	M, \$300
Betting with Minor	§39-6-630	M, \$50
Unlawful Sale of Alcoholic Beverages	§39-6-902	M \$100 to \$500
Possession of Still	§39-6-918	M \$100 to \$500
Storage of Liquor for Sale	§39-6-921	M \$100 to \$500
Purchase of Alcohol for Minors	§39-6-929	M
Consume Alcohol on School Premises	§39-6-930	M

II. Noncriminal Code Misdemeanors

Offense	Section	Fine
Failure to Comply with Bail Conditions by Witness	§40-11-112	Forfeit Bail
Nonpayment of Fines	§40-24-104	Imprisonment
Sale of Unregistered Security	§48-16-104	Unlawful \$5,000
Securities Law Violations	§48-16-123	\$5,000
Truancy	§49-1723	M \$2 to \$10
Misrepresentation to Obtain Unemployment Compensation	§50-7-709	M
Drug Prescription Laws Violation	§53-10-108	M \$500
Food Establishments Safety Violations	§53-8-115	M \$10 to \$50
Rules of the Road Violations	§54-16-108	M
Hit and Run (Personal Injury)	§55-10-101	\$1,000 to \$10,000
Hit and Run (Property Damage)	§55-10-102	M

Penalty for Traffic Violations (Chapters 8 and 9 of Title 55)	§55-10-301	\$2 to \$50
Party to Traffic Violations (Chapters 8 and 9 of Title 55)	§55-10-201	\$2 to \$50
Reckless Driving	§55-10-205	\$25 to \$500
Driving While Intoxicated	§55-10-403	\$10 to \$500
Drag Racing	§55-10-502	M \$50 to \$500
Illegal Hauling of Loose Materials	§55-11-109	\$50
Penalty for Violation of Vehicle Size, Weight, and Load Restrictions	§55-11-206	M \$25 to \$50
Violation of Vehicle Registration Laws	§55-5-114	M \$25 to \$50
Improper Use of Auto Registration Papers	§55-5-115	M
Use of Stolen Auto Plates	§55-5-126	M
No Driver's License	§55-7-108	M

Non-possession of Driver's License	§55-7-109	M \$2 to \$50
Unlawful Use of Driver's License	§55-7-115	M
Driving While License Suspended/Revoked	§55-7-116	M \$500
Speed Limit Violations	§55-8-152	M \$10 to \$25
Various Automobile Regulations Rules of Road and Equipment	Title 53, Ch. 8 & 9	No More than \$1,000
Collection Service Regulations Violations	§62-20-123	\$5,000 to \$10,000
Rental Location Agents Regulations Violations	§62-25-103	M
Funeral Directors Regulations Violation	§62-5-406	M \$100 to \$500
Fraud in Obtaining Accommodations or Restaurant Services (\$200 or less)	§62-7-107	M \$500
Contractors Regulations Violation	§62-6-120	\$1,000 to \$5,000

Practicing Nursing Without a License	§63-7-120	M \$50 to \$1,000
Motor Carrier Regulations Violation	§63-15-122	M \$25
Hunting Without License	§70-2-101	M \$10 to \$25
Training Dogs Without a License	§70-2-214	M \$25 to \$50
Hunting Without Permission of Landowner	§70-4-106	M \$25 to \$250
Shooting Across Road	§70-4-108	M \$25 to \$50
Hunting from Motor Vehicle	§70-4-109	M \$25 to \$50
Hunting Deer with Light	§70-4-110	\$50 to \$500
Hunting During Closed Season	§70-4-111	\$100 to \$500
Hunting Regulated Coons	§70-4-112	M \$50
Prohibited Hunting Devices	§70-4-113	M \$50
Destruction of Wildlife	§70-4-115	M \$25 to \$50
Hurting Property		

Illegal Possession of Hunting Weapons	§70-4-117	\$50 to \$500
Illegal Hunting of Deer with Dogs	§70-4-118	M \$50
Explosives or Electrical Devices on Fists	§70-4-119	\$50 to \$500
Illegal Hunting with Traps	§70-4-120	M \$50
Coon Dog Training Restrictions	§70-4-122	M
Archery Hunt Violations	§70-4-123	M
Hunting Approval Regulations	§70-4-124	M \$25
Illegal Traffic in Wildlife	§70-4-201	M \$50
Illegal Possession of Wildlife Hides	§70-4-202	M \$50
Transportation Out of State of Protected Wildlife	§70-4-203	M \$25 to \$50
Cold Storage for Wildlife	§70-4-204	\$25 to \$50
Use of State-Controlled Waters	§70-4-205	M \$25 to \$50

Pollution of Water	§70-4-206	M \$500
Defacing or Destroying Notice of Commission or Agency	§70-4-207	M
Unlawful Importation of Skunks	§70-4-208	M \$50 to \$500
Dealing in Fox Hides	§70-4-209	M
Wildlife Preserve Regulation Violation	§70-5-101	M \$25 to \$50
Violation of Department of Conservation Laws	§11-1-109	M
Fraud to obtain Food Coupons (less than \$100)	§14-27-114	M \$1,000
Signatures on Political Circulars	§2-19-120	M
Contempt of Court--General Law	§29-9-103	Fines \$50, where unspecified by statute
Contributing to Delinquency of a Child	§37-254	M \$50

Contributing to Dependency of a Child (and Neglect)	§37-255	M \$50
Allowing Unauthorized Persons to Attend Execution	§40-23-116	M \$100 to \$500
Prison Production; Unlawful Sale of Coal	§41-22-106	M \$50 to \$500
Destruction of Criminal Records After Acquittal	§40-32-104	M \$500 to \$1,000
Allowing Dogs to Run at Large	§44-8-109	M \$2 to \$50
Violation of Pawnbrokers Regulation	§45-6-106	M \$100 to \$500

Appendix F
State Survey of Fines Levied for Violation of State Obscenity Law

State	Section	Status	Fine
1. Alabama	§13A-12-178 (1982)	Mis.	\$10,000
2. Alaska	Not prohibited, child pornography only is forbidden		
3. Arkansas	§41-3584.3 (1981)	Mis.	1st Offense Class B. Mis. 2nd Offense Class A Mis. 3rd Offense Class D Fel. Class B Mis. - \$1,000 Class A Mis. - \$1,500 Organization violator - double any pecuniary gain or double maximum fine
	§41-1101(11977)		
4. Arizona	§13-3502 (1978)	Fe.	(Imprisonment 1-½ years)
5. California	§311.9 (1983)	Mis.	\$1,000 plus \$5 for each additional unit of proscribed material
6. Colorado	§18-7-102 (1982) §18-1-106 (1981)	Mis.	Class A Mis. Class A Mis. is \$500

7. Connecticut	§53(a)-194 (1972) §53(a)-42(2) 1972 §53(a)-42 (1972)	Class B Mis.	Class B Mis. is \$1,000/double pecuniary gain
8. Delaware	10§7209	Civil Penalty	
9. Florida	§847.011 (1976) §775.083 (1983)	1st Offense Mis. 1st Degree	(d) \$1,000 (f) Double pecuniary gain
10. Georgia	§16-12-80 (1982) §17-10-4 (1982)	High and aggravated misdemeanor	\$5,000
11. Hawaii	§712-1214 (1976) §706-640 (1976)	Mis.	(3) \$1,000 (5) Double pecuniary gain
12. Idaho	§18-4109	Mis.	\$300
13. Illinois	Vol. 38 §11-20 (1979); §1005-9-1 (1982)	1st Offense Class A Mis.	Class A Mis. is \$1,000
14. Indiana	§35-30-10.1-2 (1979); §35-50-3-2 (1979)	Class A Mis.	\$5,000

15. Iowa	Vol. 55 §728.4 (1979); Vol. 57(A)- §903.1 (1979)	Mis.	\$100
16. Kansas	§21-4301	Class A Mis.	Not more than \$2,500, or double pecuniary gain
17. Kentucky	§531.020 (1975)	Class Mis. if more than one article	Corp. Fine \$10,000
18. Louisiana	Vol. 9A §14.106(G) (1983)	Not Specified	Between \$1,000 and \$2,500
19. Maine	17 §2911 17A §1301(3)(E)	Class D Crime	Corp. Fine \$10,000 \$5,000
20. Maryland	27 §424 (1982)	Not Specified	1st Offense \$1,000
21. Massachusetts	272-§29 (1983)	Not Specified	Between \$1,000 and \$10,000
22. Michigan	§750.343(a)	Mis.	\$1,000
23. Minnesota	§617.241 (1983)	Mis.	1st Offense , \$5,000
24. Mississippi	§97-29-37 (1972)	Mis.	\$500

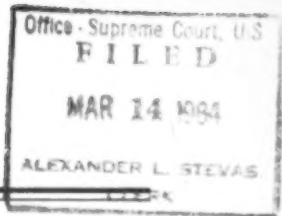
25. Missouri	41A §563.280 (1979)	Mis.	Between \$500 and \$1,000
26. Montana	§94-8-110(4) (1973)	Mis.	Between \$500 and \$1,000
27. Nebraska	§28-813 (1979) §28-106 (1979)	Class I Mis.	\$1,000
28. Nevada	§201-249 (1979) §193-120 (1979)	Mis.	\$1,000
29. New Hampshire	§650:2 (1981) 6 §25:9 (1974)	Mis.	Corp. fine between \$50 and \$200
30. New Jersey	§2C:34-2(b) (1982) §2C:43-3(c) (1982)	Disorderly person (not crime)	 \$1,000
31. New Mexico	Provision only for Sale to Minors		
32. New York	§235.05 §80.10(b)	Class A Mis. (2nd degree)	Corp. fine Class A Mis. \$5,000

33. North Carolina	§14-190.1	Mis.	Fine within discretion of courts
34. North Dakota	§21.1-27.1-01 (1976) §12.1-32-01.1 (1976)	Class A Mis.	Corp. fine \$15,000
35. Ohio	§2907.32 (1982) §2929.31 (1982)	1st degree Mis.	Corp. fine \$5,000
36. Oklahoma	39 §1021 (1982)	Felony	Between \$100 and \$10,000
37. Oregon	§167.087 (1980) §161.635(a) (1980)	Class A Mis.	\$1,000
38. Pennsylvania	18§5903(h) 18§1101 (1983)	1st degree Mis.	\$10,000
39. Rhode Island	§11-31-1	Mis.	\$100 to \$1,000
40. South Carolina	§16-15-320 (1982)	Mis.	1st Offense \$1,000
41. South Dakota	§22-24-25 to §22-24-37	*	\$1,000

* Obscenity distribution to adults not prohibited; offense to display obscene covers in public place.

42. Tennessee	§39-6-1104	Mis.	1st offense - individual 60 days; corp. or other entity \$10,000 - \$50,000
43. Texas	Penal §43.23 (1982) Penal §1.01 (1974)	Felony of 3rd Degree	\$5,000
44. Utah	§76-10-1204 (1978) §76-3-302(2)	Class A Mis.	\$5,000
45. Vermont	13§2807 (1982)	Mis.	\$1,000
46. Virginia	§18.2-374	Class I Mis.	\$1,000
47. Washington	§9.68.140 (1983)	Felony	Between \$5,000 and \$50,000
48. West Virginia	§8-12-5(b)	Allows Municipal Ord. Mis.	\$500
49. Wisconsin	§134-46 (1982)	Mis.	\$1,000
50. Wyoming	§6-4-302 (1983)	Mis.	\$1,000

No. 83-1116



IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

LUCY M. HUNT AND GUESS WHAT, INC.,
Petitioners,

vs.

STATE OF TENNESSEE,
Respondent.

On Petition for a Writ of Certiorari
to the Court of Criminal Appeals of Tennessee

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

GORDON W. SMITH,
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-2217
Counsel for Respondent

OF COUNSEL:

WILLIAM M. LEECH, JR.
Attorney General
State of Tennessee

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**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

The respondent respectfully submits that the petition for a writ of certiorari filed in this cause should be denied.

OPINIONS BELOW

The opinion of the Tennessee Court of Criminal Appeals in the instant case is published and appears at 660 S.W.2d 513. The per curiam opinion of the Tennessee Supreme Court denying the petitioners' application for permission to appeal is unpublished and appears in the appendix to petitioners' petition for writ of certiorari to this Court.

JURISDICTION

Jurisdiction to this Court is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

Petitioners essentially present the following questions for review.

1. Whether the corporate petitioners' fine of \$15,000.00 on a misdemeanor charge of obscenity and the statutory requirement of a minimum fine of \$10,000.00 constitute excessive fines under the Eighth Amendment to the United States Constitution.

2. Whether the exemption of certain persons from prosecution under Tennessee Code Annotated, Section 39-6-1117, is arbitrary and overbroad in violation of equal protection and due process under the Fourteenth Amendment to the United States Constitution.

3. Whether Tennessee Code Annotated, Section 39-6-1104, classifying punishment for violators of the obscenity law, is vague, indefinite, arbitrary and without rational basis in violation of equal protection and due process under the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Eighth Amendment to the United States Constitution:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. Fourteenth Amendment to the United States Constitution:

... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

At the September, 1981, Term, the Shelby County Grand Jury returned three indictments: No. B-82306, containing eight counts; No. B-82307, containing twelve counts; and No.

B-82316, containing four counts. Petitioner Lucy M. Hunt was charged in No. B-82306, count 1, with knowingly distributing obscene matter, a film entitled "Virgin Ass", and in count 5 with knowingly distributing obscene matter, an untitled film. Petitioner Hunt was charged in No. B-82307, count 1, with knowingly distributing obscene matter, a film entitled "Breakfast in Bed"; in count 5 with knowingly distributing obscene matter, a film entitled "Orange Blossom Summer"; and in count 9 with knowingly distributing obscene matter, a magazine entitled "Shaved Dolls." Petitioner Hunt was charged in No. B-82316, count 1, with knowingly distributing obscene matter, a magazine entitled "No. 1 Prive."

Petitioner Guess What, Inc., was charged in No. B-82306, count 4, with knowingly possessing with intent to distribute obscene matter, the film entitled "Virgin Ass", and in count 8 with knowingly possessing obscene matter, an untitled film. Petitioner Guess What, Inc., was charged in No. B-82307, count 4, with possessing with intent to distribute obscene matter, a film entitled "Breakfast in Bed"; in count 8 with knowingly possessing with intent to distribute obscene matter, a film entitled "Orange Blossom Summer"; and in count 12 with knowingly possessing with intent to distribute obscene matter, a magazine entitled "Shaved Dolls." Petitioner Guess What, Inc., was charged in No. B-82316 with knowingly possessing with intent to distribute obscene matter, a magazine entitled "No. 1 Prive."

Petitioners' trial commenced on March 5, 1982, following pleas of not guilty. On March 15, 1982, the jury found petitioner Hunt guilty in counts 1 and 5 of No. B-82306, guilty in count 5 of No. B-82307, and guilty in count 1 of No. B-82316. The jury fixed punishment at sixty days' confinement in the county jail on each count. The jury found petitioner Guess What, Inc., guilty in counts 4 and 8 of No. B-82306, guilty in count 8 of No. B-82307, and guilty in count 4 of No. B-82316. The jury imposed fines of \$15,000.00 on each count.

The petitioners filed a motion for a new trial on April 8, 1982, which motion was denied on May 7, 1982. The trial court ordered that the jury verdicts on counts 1 and 5 of No. B-82306 be merged as to petitioner Hunt and that the verdicts on counts 4 and 8 of No. B-82306 be merged as to petitioner Guess What, Inc. Petitioner Hunt's sentences were ordered to be served concurrently. Thus, petitioner Hunt was ordered to serve three sixty-day concurrent sentences for knowingly distributing obscene matter. Petitioner Guess What, Inc., was ordered to pay three fines of \$15,000.00 for a total of \$45,000.00, for knowingly possessing with intent to distribute obscene matter.

The petitioners appealed their convictions to the Tennessee Court of Criminal Appeals. On July 14, 1983, the Court affirmed the judgment of the trial court. A petition to rehear was denied on August 8, 1983. A supplemental petition to rehear was denied on August 18, 1983. Permission to appeal was denied by the Tennessee Supreme Court on November 7, 1983.

REASONS FOR DENYING THE WRIT

Respondent respectfully submits that the instant petition should be denied since the judgment of the Tennessee Court of Criminal Appeals does not involve any federal question of substance not heretofore determined by this Court or not decided in accord with applicable decisions of this Court. See Supreme Court Rule 17.1(c).

A

In the first question presented to the Court, petitioner Guess What, Inc., contends that a fine of \$15,000.00 on a misdemeanor charge of obscenity and the statutory requirement of a minimum fine of \$10,000.00 is excessive in violation of the Eighth Amendment to the United States Constitution. The petitioner relies upon *Solem v. Helm*, ____ U.S. ____, 103 S.Ct. 3001 (1983).

In *Solem v. Helm*, ____ U.S. ____, 103 S.Ct. 3001 (1983), this Court held that the Eighth Amendment prohibits not only barbaric punishments, but also sentences that are disproportionate to the crimes committed. 103 S.Ct. at 3006. The Court recognized "parallel limitations" on bail, fines, and other punishments. 103 S.Ct. at 3009. In measuring disproportionality, a court must consider (1) the gravity of the offense as compared to the harshness of the penalty; (2) sentences imposed on other criminals in the same jurisdiction; and (3) sentences for the same crime in other jurisdictions. 103 S.Ct. at 3010-3011.

Applying these criteria to the instant case, it is clear that the fines imposed¹ upon the petitioner, Guess What, Inc., are not so

¹ The *Solem* case furnishes no basis for a facial constitutional challenge of a statutory punishment under the Eighth Amendment. The Court did not hold the South Dakota recidivist statutes unconstitutional *per se*, but only as they were applied to Helm. Thus, petitioner's additional contention that the statutory minimum fine of \$10,000.00 is *per se* excessive cannot be sustained.

disproportionate as to be excessive. First, while the offense of knowingly possessing obscene matter with intent to distribute is not a violent crime, the fines of \$15,000.00 are far less stringent than the penalty suffered by Helm. As the Court noted in *Solem*, Helm's sentence was the most severe punishment that the State could have imposed on any criminal for any crime. 103 S.Ct. at 3013.

Second, comparing the fines imposed on other criminals in Tennessee does not show that the fines in the instant case are disproportionate. It cannot be said that more serious crimes in Tennessee are subject to the same penalty or to less serious penalties.

Finally, comparing the fines imposed for the commission of the same crime in other jurisdictions does not demonstrate disproportionality. The states of Washington, Wash. Rev. Code § 9.68.140 (1983), North Dakota, N.D. Cent. Code §§ 21.1-27.1-01, 12.1-32-01.1, impose fines comparable to those imposed in Tennessee. It should be noted that a fine of \$15,000.00 under the federal obscenity statute was held not excessive under the Eighth Amendment. *United States v. Danley*, 523 F.2d 369, 370-371 (9th Cir. 1975), *cert. denied*, 424 U.S. 929 (1976).

The respondent submits that the fines imposed upon the petitioner are not disproportionate so as to be excessive under the Eighth Amendment. Accordingly, the petitioners' contention does not merit the granting of certiorari.

B

In the second question presented to this Court, the petitioners contend that Tenn. Code Ann. § 39-6-1117, providing exemption of certain persons and institutions from the coverage of obscenity laws, is overbroad, arbitrary, and without rational basis in violation of due process and equal protection.

In *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961), this Court reaffirmed the established view that under the Fourteenth Amendment of the United States Constitution the states are endowed with a wide scope of discretion in the enactment of laws which affect certain groups of citizens differently than others. However, such classifications must be based on grounds reasonably related to the achievement of a legitimate state objective. The exemptions provided for in Tenn. Code Ann. § 39-6-1117 serve the purpose of allowing materials which might be classified as obscene to be used for legitimate educational, scientific, or artistic purposes without fear of prosecution. The goal of ridding society of obscene materials totally lacking any serious literary, artistic, political, or scientific value is a legitimate one. The exemption is not arbitrary and is equally applicable to all persons or institutions in the exempted class.

Nor is the statute overbroad. Those within the exempted class are treated equally and it is a valid exercise of the police power of the State to grant certain exemptions from the operation of general laws. Likewise, there is no improper classification of those individuals who are exempt. The exempt class bears a rational relationship towards a legitimate government interest of protecting activity which may be obscene in certain specific instances.

Although the term "any recognized and established", as applied to the various institutions, is not absolutely precise, "lack of precision is not itself offensive to the requirement of due process". *Roth v. United States*, 354 U.S. 476, 491, 77 S.Ct. 1304, 1312, 1 L.Ed.2d 1498 (1957). So long as the petitioners were given adequate warnings as to what conduct was proscribed, they cannot complain of a due process violation. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972). One "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others". *Village of Hoffman*

Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). The petitioners' allegation on this issue does not merit the granting of certiorari.

C

In the final question presented to this Court, the petitioners contend that Tenn. Code Ann. § 39-6-1104, classifying punishment for violators of the obscenity laws, is vague, indefinite, and arbitrary and without rational basis in violation of equal protection and due process.

The respondent submits that this statute has a rational relationship to a legitimate government interest and is not arbitrary. The Tennessee Legislature has chosen to single out those offenders who deal more heavily in obscene material and subject them to more severe punishment. Under the statute, the breakpoint between Class A and Class B violators is 25% of the stock in trade, inventory, and sales of the violator during any given twenty-four hour period. The 25% figure is not an arbitrary amount in that it will ensure that the offenders who deal primarily in obscene materials will be subjected to more severe punishment than those who do so only as a small incidental portion of their business.

Furthermore, the punishment section of Tenn. Code Ann. § 39-6-1104(e) and (f) does not unconstitutionally distinguish between those who sell obscene printed matter and those who sell obscene movies. The Tennessee courts have held that this section must be read *in pari materia* with Tenn. Code Ann. § 39-6-1101(4) which defines obscene "matter" to include motion picture films; as so read, the statute does not distinguish between printed matter and movies. *State v. Hunt*, 660 S.W.2d 513, 519 (Tenn. Crim. App. 1983); *State v. Davis*, 654 S.W.2d 688, 693 (Tenn. Crim. App. 1983). The petitioners' allegation on this issue does not merit the granting of certiorari.

CONCLUSION

For the reasons stated herein, respondent respectfully submits that, in affirming petitioners' convictions, the Tennessee Court of Criminal Appeals did not decide a federal question of substance not heretofore determined by this Court nor did it decide any such question in a way probably not in accord with applicable decisions of this Court. There are no special or important reasons for granting certiorari in this cause, and accordingly, the instant petition should be denied.

Respectfully submitted,

GORDON W. SMITH

Assistant Attorney General

450 James Robertson Parkway

Nashville, Tennessee 37219

(615) 741-2217

Counsel for Respondent

OF COUNSEL:

WILLIAM M. LEECH, JR.

Attorney General

State of Tennessee

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No. 83-1116

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

LUCY M. HUNT AND GUESS WHAT, INC.,
Petitioners,

vs.

STATE OF TENNESSEE,
Respondent.

On Petition For A Writ of Certiorari
to the Court of Criminal Appeals of Tennessee

**RESPONSE TO BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

STEPHEN D. WAKEFIELD
MICHAEL F. PLEASANTS
2000 First Tennessee Building
Memphis, Tennessee 38103
(901) 526-2000
Counsel for Petitioners

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In response to the Brief in Opposition To Petition For Writ of Certiorari filed by the State of Tennessee, Petitioners desire to make known to the Court the recent decision of the Ninth Circuit Court of Appeals in the consolidated cases styled *J-R Distributors, Inc. v. Eikenberry*, ___F. 2d___, Nos. 82-3441, 82-3442, and 82-3500 through 82-3504 (9th Cir., Feb. 6, 1984) (available Westlaw CTA 9 database). This decision held the Washington State Anti-Obscenity Statute unconstitutional, though on grounds other than urged in Petitioner's Petition For Certiorari. The Opinion specifically referred to Washington House Bill 626, effective April 1, 1982, and subsequent to its enactment, codified as Wash. Rev. Code §9.68.140. This decision, which only very recently came to the attention of Peti-

tioners' counsel, should be noted as an amendment to Appendix F of the Petition For Writ of Certiorari heretofore filed, at Page A-47 thereof. The statement of the State of Tennessee, on Page 6 of its Brief In Opposition, to the effect that the State of Washington imposes fines comparable to those imposed in Tennessee should be disregarded. No state now allows a fine anywhere close to the maximum fines permitted under the Tennessee statute. This Honorable Court may take judicial notice that in obscenity cases in Shelby County, fines have been levied in the maximum amount of \$50,000.00, against business defendants. In *State v. Lorene Summers and Tick Enterprises, Inc.*, (Shelby County, Tennessee Indictment No. 82315, On Appeal to the Court of Criminal Appeals at Jackson, Tennessee, as Shelby Criminal No. 110), a fine of \$50,000.00 was levied against Tick Enterprises, Inc. In the case of *State of Tennessee v. Bill Davis, Latcherette Jamison and Guess What, Inc.*, (Shelby County, Tennessee Indictment Nos. 82309, 82310 and 82311, on Appeal to the Court of Criminal Appeals at Jackson, Tennessee, as Shelby Criminal No. 115), the Petitioner, Guess What, Inc., in the instant case, had three maximum fines of \$50,000.00, or a total of \$150,000.00, assessed against it.

CONCLUSION

Petitioners respectfully request that this Response To Brief In Opposition To Petition For Certiorari be considered by this Honorable Court, and that the relief requested in the original Petition be granted.

Respectfully submitted,

Michael F. Pleasants
2000, First Tennessee Building
Memphis, Tennessee 38103
(901) 526-2000

Attorney for Petitioners